87

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 254.

LAURA ELLEN JONES, WIDOW AND TESTAMENTARY EXECUTRIX OF SIDNEY A. STOCKDALE, LATE COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

WATSON VAN BENTHUYSEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED OCTOBER 11, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 254.

LAURA ELLEN JONES, WIDOW AND TESTAMENTARY EXECUTRIX OF SIDNEY A. STOCKDALE, LATE COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

WATSON VAN BENTHUYSEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Petition for writ of certiorari	1	1
Order for writ of certiorari	4	2
Writ of certiorari	5	2
Transcript from State court	7	3
Answer	19	7
Supplemental answer	19	7
Defendant's bill of exceptions	20	7
Verdict	23	8
Motion for a new trial	24	9
Order new trial refused	28	10
Judgment	28	10
Motion and order for writ of error	30	11
Clerk's certificate	31	11
Citation in error	32	12
Writ of error	33	13

1 *Petition for writ of certiorari.—Filed January 7th, 1873.*

UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

WATSON VAN BENTHUYSEN
vs.
SIDNEY A. STOCKDALE. } No. 6870.

To the honorable the circuit court of the United States for the fifth circuit and district of Louisiana:

The petition of S. A. Stockdale, with respect, shows that he is an officer of the United States, to wit, collector of internal revenue for the first collection district of Louisiana, duly appointed and acting under an act of Congress entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," passed 30th June, 1864, and the acts amendatory thereof.

That a civil suit has been commenced against him in a court of
2 the State of Louisiana, to wit, in the fourth district court for the parish of Orleans, holding sessions in the city of New Orleans, by Watson Van Benthuysen, domiciled in the city of New Orleans, said suit being No. 38383 of the docket of said court, and process therein issued has been served upon petitioner, in the district of Louisiana and within the jurisdiction of this court; that no trial of the said cause has as yet been had; that the said W. Van Benthuysen seeks by the said suit to recover from petitioner the sum of twenty-five hundred and twelve dollars ($2,512), for alleged wrongful and illegal collection of internal revenue tax on manufactured tobacco, as agent for the manufacturers, from 1st day of April, 1869, to 31st day of Jan'y, 1872.

The premises considered, your petitioner prays that a writ of certiorari may issue to the said fourth district court for the parish of Orleans, requiring it to send to this honorable court the record and proceedings in said cause, in conformity to the 67th section of the act of Congress entitled "An act to reduce internal taxation, and to amend an act entitled 'An act to produce internal revenue to support the
3 government, to pay interest on the public debt, and for other purposes,' approved 30th June, 1864, and acts amendatory thereof," approved 13th July, 1866.

(Signed) J. R. BECKWITH,
Attorney for Petitioners.

Affidavit.

S. A. Stockdale, petitioner herein, being sworn, says that all the allegations in the petition are true, to the best of his knowledge and belief.

(Signed) S. A. STOCKDALE.

Sworn to and subscribed before me, January 7th, 1873.

(Signed) F. B. VINOT,
U. S. Comm'r.

Certificate of counsel.

I certify that as counsel for petitioner, S. A. Stockdale, I have examined the proceedings against him and carefully enquired into all the

matters set forth in the petition, and I verily believe the same to be true.

(Signed) J. R. BECKWITH, *Att'y, &c.*

4 *Order.*

Let a writ of certiorari issue as prayed for.
Jan'y 7th, 1873.
(Signed) E. H. DURELL, *Judge.*

5 *Writ of certiorari.—Issued January 7th*, 1873.

UNITED STATES OF AMERICA,
District of Louisiana, ss:

Circuit court of the United States for the fifth circuit and district of Louisiana.

The President of the United States of America to the honorable the fourth district court for the parish of Orleans, greeting:

Because it has been represented to us in our said court that a cause has been lately instituted and now is pending in said court, wherein Watson Van Benthuysen is plaintiff and Sidney A. Stockdale, an officer of the United States, to wit, collector of internal revenue for the first collection district of Louisiana, is defendant, said cause being represented to us as being No. 38383 of the docket of said court, and that the said Sidney A. Stockdale has been served with process therein issued, and because the said Sidney A. Stockdale has this day filed in our said court his petition, duly verified and certified as required by law, wherein he has complained that the said suit was and is instituted against him, so being such officer as aforesaid, for and on account of an act done by him as such officer as aforesaid, under color of his said office, administering the revenue laws of the United States,
6 and has in due form of law prayed of us that said suit be entered on the docket of our said court, and that the said cause be hereafter proceeded in all respects as if the said cause had been originally commenced in our said court; and we, being willing that the same shall be done, & having ordered the said cause to be entered on the docket of our said court, where the said cause is now so docketed: We, therefore, command you that you do forthwith certify to us in our said court a full record of all the proceedings had and of record in your said court in, about, or concerning the said cause now remaining in your said court, that said cause may be proceeded in, in our said court, as by the statutes of the said United States provided and required.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 7th day of January, A. D. 1873.

[SEAL.] (Signed) F. B. VINOT, *D'y Clk.*

Marshal's return.

Received January 7, 1873, by the U. S. marshal, and on the 9th day of same month and year served a copy of within writ of certiorari on the fourth district court, named herein, by handing the same to B. L. Lynch, the judge of said court.

New Orleans, January 9th, 1873.

(Signed) S. W. REED,
D'y U. S. Marshal.

7 *Transcript from State court.—Filed January 25th, 1873.*

STATE OF LOUISIANA:

Fourth district court for the parish of Orleans.

WATSON VAN BENTHUYSEN
versus
SIDNEY A. STOCKDALE. } No. 38383.

Petition.—Filed January 3d, 1873.

To the honorable the fourth district court for the parish of Orleans:

The petition of Watson Van Benthuysen, who resides in New Orleans, in said State, respectfully shows that Sidney A. Stockdale, re-
8 siding at the same place, is indebted to your petitioner in the sum of twenty-five hundred and twelve dollars, with interest thereon, as hereinafter claimed, for this, to wit:

Since the first day of March, A. D. 1869, your petitioner has been engaged in the business of commission merchant at New Orleans aforesaid, his sole business being the sale of manufactured tobacco, consigned to him by the manufacturers thereof, they paying him the usual commissions upon such sales; that from the first day of April, 1869, to the thirty-first day of January, 1872, both dates inclusive, his sales of manufactured tobacco, as such agent for the manufacturers thereof, amounted to the sum of seven hundred and eighty-seven thousand eight hundred and fifty-five $\frac{47}{100}$ dollars, and that upon the sale or removal for sale of said tobacco, the United States internal revenue tax thereon accrued, and was paid by the purchase affixing and cancellation of tax-paid stamps upon the packages containing said tobacco, and the taxes so paid upon the tobacco so sold by him during the period of time aforesaid amounts to the sum of four hundred and sixty-
9 eight thousand one hundred and forty-four $\frac{33}{100}$ dollars.

And Sidney A. Stockdale, being collector of United States internal revenue in and for the first collection district of the State of Louisiana, did, on or about the twentieth day of each and every month from the month of May, 1869, to the month of February, 1872, both inclusive, unlawfully and wrongfully demand from your petitioner an alleged tax upon the sales of such manufactured tobacco so by him made for the manufacturers thereof, and upon the tax paid thereon during the preceding month at the rate of two dollars per thousand dollars of sales, tax included, claiming that such monthly tax was due to the United States by reason of assessments made by B. F. Joubert, assessor of United States internal revenue for said district, and to avoid threatened costs and penalties petitioner paid the sums as demanded, but under protest, to the said defendant, the total amount so paid for the period of time aforesaid being the sum of two thousand five hundred and twelve dollars.

Petitioner hereto annexes a schedule of his monthly sales of
10 tobacco during the period aforesaid, the amount of tax demanded monthly thereon by the defendant, and the date of his payment of such alleged taxes, and said schedule is made a part of this petition.

Petitioner avers that said tobacco was usually sold in bond, and the specific tax thereon, represented by stamps, was paid after such sales were made.

Your petitioner avers that said assessments and collections of said sums of money alleged to be taxes were wholly without warrant or authority in law.

Your petitioner avers that according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, he appealed to the Commissioner of Internal Revenue for, and demanded the refunding to him, the aggregate sum of money so as aforesaid wrongfully and illegally demanded and collected from your petitioner by said defendant, and said Commissioner, on the sixth day of July, A. D. 1872, rejected said demand, within six months prior to the commencement of this suit.

11 Wherefore your petitioner prays that said defendant, Sidney A. Stockdale, be cited to answer this demand, and that after due proceedings had he be condemned to pay your petitioner the sum of twenty five hundred and twelve dollars, with legal interest upon each separate payment, from the date of such payment, as herein set forth, until paid, and costs of suit.

And petitioner prays for general relief.

(Signed) J. D. ROUSE,
Att'y for Petitioner.

Schedules of sales of manufactured tobacco made by W. Benthuysen, the costs of stamps affixed and amount of tax assessed upon said sales, including stamps.

Time embraced in each assessment. Months.	Sales of tobacco less costs of stamps.	Costs of stamps affixed to tobacco sold.	Amount upon which tax was ass'd & paid at $2 per M.	Am't tax at $2 per M ass'd & fixed.	Date of paym't of tax.
1869.					1869.
April	13,926 08	7,073 92	21,000	42	May 24.
May	5,106 88	9,893 12	15,000	30	June 25.
June	8,920	16,080 00	25,000	50	July 26.
July	34,230 40	5,769 60	40,000	80	Aug. 30.
August	21,767 68	3,232 32	25,000	50	Sept. 25.
September	41,409 60	13,590 40	55,000	110	Oct. 29.
October	29,341 76	9,658 24	39,000	78	December 3.
November	31,366 40	12,633 60	44,000	88	Dec. 30.
December	28,407 68	12,592 32	41,000	82	1870.
1870.					Jan'y 29.
January	30,393 92	19,606 08	50,000	100	M'ch 3.
12 February	24,876 64	35,123 36	60,000	120	March 31.
M'ch	12,647 36	27,352 64	40,000	80	Ap'l 23.
Ap'l	18,785 28	21,214 72	40,000	80	May 26.
May	8,901 92	11,798 08	20,000	40	June 30.
June	10,279 36	9,720 64	20,000	40	July 23.
July	19,283 20	5,716 80	25,000	50	Aug. 24.
Aug	4,607 67	15,392 33	20,000	40	Sept. 29.
Sept'r	8,112 96	16,887 04	25,000	50	Oct. 28.
Oct	52,975 68	12,024 32	65,000	130	Nov. 30.
Nov	28,912 72	29,577 28	58,490	116	Dec'r 28.
Dec	27,907 84	15,092 16	43,000	86	1871.
1871.					June 27.
Jan'y	25,083 20	15,916 80	41,000	82	Feb'y 25.
Feb'ry	28,904 48	17,095 52	46,000	92	M'ch 28.
M'ch	13,797 76	18,202 24	32,000	65	Ap'l 27.
April	17,707 36	11,192 64	28,900	58	May 29.
May	16,072 64	8 927 36	25,000	50	June 29.
June	14,316 32	11,383 68	25,700	51	July 29.
July	25,564 96	10,935 04	34,500	69	Aug. 31.
Aug	12,327 68	2,672 32	15,200	30	Sept. 26.
Sept	28,048 80	10,651 20	38,700	77	Oct. 30.
Oct	42,437 76	23,562 24	66,000	132	Nov. 25.
Nov	33,354 48	10,645 52	54,000	108	Dec'r 23.
Dec'r	27,683 52	5,716 48	33,400	66 80	1872.
1872.					Jan. 29.
Jan'y	39,185 68	8,414 32	47,600	95 20	Feb'ry 23.
			2,512		

Citation.

STATE OF LOUISIANA:

W. VAN BENTHUYSEN
vs.
S. A. STOCKDALE. } No. 38383.

13 Fourth district court for the parish of Orleans, in the city of New Orleans.

MR. SIDNEY A. STOCKDALE:

You are hereby commanded to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fourth district court for the parish of Orleans in ten days after the service hereof.

Witness the honorable B. L. Lynch, judge of the said court, the 3d day of January, in the year of our Lord 1873.

(Signed) A. F. LYND,
Deputy Clerk.

Sheriff's return.

On the 4th day of same month and year served a copy of within citation and accompanying petition on defendant herein, Sidney A. Stockdale, in person.

Ret. same day.

(Signed) HENRY BEMIT, *D'y Sh'ff.*

Filed January 6th, 1873.

(Signed) A. F. LYND, *D'y Clk.*

14 UNITED STATES OF AMERICA,
District of Louisiana:

Circuit court of the United States, for the fifth circuit and district of Louisiana.

The President of the United States of America to the honorable the fourth district court for the parish of Orleans, greeting:

Because it has been represented to us in our said court that a cause has been lately instituted and now is pending in said court wherein Watson Van Benthuysen is plaintiff and Sidney A. Stockdale, an officer of the United States, to wit, collector of internal revenue for the first district of Louisiana, is defendant, said cause being represented to us as being No. 38383 of the docket of said court, and that the said Sidney A. Stockdale has been been served with process therein issued, and because the said Sidney A. Stockdale has this day filed in our said court his petition, duly verified and certified as required by law, wherein he has complained that the said suit was and is instituted against him, so being such officer as aforesaid, for and on account of act done
15 by him as such officer as aforesaid under color of his said office administering the revenue laws of the United States, and has in due form of law prayed of us that said suit be entered on the docket of our said court, and that the said cause be hereafter proceeded in all respects as if the said cause had been originally commenced in our said court; and we being willing that the same shall be done, and having

ordered the said cause to be entered on the docket of our said court where the said cause is now so docketed. We therefore command you that you do forthwith certify to us in our said court a full record of all the proceedings had and of record in your said court in, about, or concerning the said cause now remaining in your said court, that said cause may be proceeded in our said court and by the statutes of the said United States provided and required.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 7th day of January, A. D. 1873.

(Signed) F. B. VINOT,
D'y Clk.

Filed January 9th, 1878.
(Signed) OSCAR ARROYO,
D'y Clk.

16 *Extract from the minutes, Thursday, January 9th, 1878.*

Present the Hon. B. L. Lynch, judge.

Ex pro pria motu, it is ordered by the court that the obedience of a writ of certiorari issued by the hon. the circuit court of the United States for the fifth circuit and district of Louisiana, that a certified copy of the record of the proceedings had and of record in this case be transmitted to the said circuit court of the United States for the fifth circuit court of Louisiana, in order that said case be proceeded in said court as provided by the statutes.

Certificates.

I, Edward De Blois, clerk of the fourth district court for the parish of Orleans, do hereby certify that the above and foregoing nine pages do contain a full, correct, and complete transcript of the record, including all proceedings had, documents filed, testimony and evidence adduced on the trial of the cause wherein Watson Van Benthuysen is plaintiff and Sydney A. Stockdale is defendant, which said cause
17 was instituted in the fourth district court for the parish of Orleans, on the day of 187 , under number 38383.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of New Orleans, this seventeenth day of January, eighteen hundred and seventy-three, and of the Independence of the United States of America the ninety-seventh year.

[SEAL.] (Signed) ED. DE BLOIS.

I, B. L. Lynch, sole judge of the fourth district court for the parish of Orleans, do certify that Edward Des Blois is clerk of said court; that the same is a court of record, having common law jurisdiction; that the signature Edward De Blois to the foregoing certificate in the proper handwriting of him, the said Edward De Blois; that to his official acts as such full faith and credit are due and owing; and I do further certify that the said attestation is in due form of law.

Given under my hand at the place and on the day and date aforesaid.

(Signed) B. L. LYNCH.
18 *Judge of the Fourth District Court for the Parish of Orleans.*

I, Edward De Blois, clerk of the fourth district court for the parish of Orleans, do hereby certify that the honorable B. L. Lynch is the sole

judge of said court, duly commissioned, qualified, and sworn, acting and presiding as such, and that the signature B. L. Lynch to the foregoing certificate is in the proper handwriting of him, the said hon'ble B. L. Lynch.

In testimony whereof I have hereunto set my hand and affixed thereto the seal of said court, at the city of New Orleans, this seventeenth day of January, in the year of our Lord one thousand eight hundred and seventy-three, and the ninety-seventh of the Independence of the United States of America.

[SEAL.] (Signed) ED. DE BLOIS, *Clerk.*

19 Proceedings in the circuit court of the United States, district of Louisiana.

Answer.—Filed April 2d, 1873.

U. S. circuit court, fifth circuit and district of Louisiana.

W. V. BENTHUYSEN
vs.
SIDNEY A. STOCKDALE.

Now comes the defendant, and for answer to plaintiff's petition denies all and singular the allegations therein contained, and prays to be hence dismissed with costs.

(Signed) J. R. BECKWITH,
U. S. Att'y for Def't.

Supplemental answer.—Filed July 7th, 1877.

U. S. circuit court.

VAN BENTHUYSEN
vs. No. 6870.
S. A. STOCKDALE.

And now before the court comes the said defendants, and for further and supplemental answer to the petition herein filed and served she says:

That the tax referred to in the petition was duly and lawfully assessed against the said plaintiff, and that the acts and conduct
20 of the said Stockdale in reference to the collection of such tax was in accordance with the laws of the United States in such cases made and provided.

She further says that the said plaintiff is without right at law or in equity to have and maintain the present action, or any other action, for the recovery of the claim and demand sued on.

Wherefore this defendant prays for leave to file this her supplemental answer, and leave being granted, she prays for judgment in her favor, with costs, and general relief in the premises.

(Signed) GEO. S. LACEY,
U. S. Att'y.

Defendant's bill of exceptions.

United States circuit court.

W. VAN BENTHUYSEN
vs.
S. A. STOCKDALE ET ALS. } No. 6870.

Be it remembered that upon the trial of this cause before a jury, Judge E. C. Billings presiding, evidence was adduced tending to establish that the sales of tobacco upon which the tax had been collected, for the recovery back of which this action was brought, were made
21 while the tobacco was in bond, and was situated in the bonded warehouse; that said tax was assessed and collected upon the value of the tobacco and upon the amount of stamps which by law were required to be affixed upon the same before it was removed from the bonded warehouse; that the value of the tobacco so sold was $787,855\frac{67}{100}$, and the amount of the stamps placed upon said tobacco was $468,144\frac{33}{100}$; and that the plaintiff was a commission merchant, charged his commissions as against his principals, both upon the value of the tobacco in bond and upon the amount invested in said stamps; that the special tax was assessed and collected upon both the value of the tobacco and the amount of the said stamps.

After the evidence and arguments were concluded, and before the jury had retired to deliberate upon their verdict, the counsel for the defendants requested the court to instruct the jury that—

"The legal basis upon which the U. S. internal revenue tax for sales against the plaintiff as a dealer in tobacco was to be calculated,
22 was the gross amount of sales of the tobacco, viz, one million two hundred and fifty-six thousand dollars, and that if the jury found that the tax sought to be recovered back in this suit was assessed and collected upon that basis, a verdict should be rendered for the defendant."

But the court refused to give this instruction, and instructed the jury that by the act of Congress the special tax of two per cent. upon the amount of sales of dealers in tobacco could not properly be assessed and collected upon the stamps which were required to be affixed upon tobacco in bond, and that if the jury found as a fact that such a tax had been levied and collected from the plaintiff not only upon the proceeds of tobacco sold in bond but upon the amount of stamps required to be affixed upon such tobacco before it could be delivered from the bonded warehouse, that to the extent of the tax upon the stamps which the plaintiff had paid to the defendant upon tobacco sold in bond he was entitled to a verdict.

To which refusal on the part of the court to give the instruc-
23 tion so requested to be given, and to the said instruction so given as above set forth by the court, and to each and every part of the same, the counsel for the defendants then and there excepted and reserved his bill of exceptions, and hereby presents the same, and prays that it may be allowed and signed, which is done accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Verdict.—Extract from the minutes, November term, 1876.

NEW ORLEANS, *Tuesday, December 11th,* 1877.

Court met pursuant to adjournment. Present, Hon. E. C. Billings, district judge.

W. VAN BENTHUYSEN
vs.
S. A. STOCKDALE. } No. 6870.

This cause came on for trial—Rouse and Grant for plaintiff, Geo. S. Lacey, U. S. attorney, for defendant—when the following jurors were called and sworn to try the issue:

1. H. C. Bartlette.
2. A. H. Isaacson.
3. James Beggs.
4. E. Dejean.
5. E. Brewer.
6. W. W. Armstrong.
7. E. Rayael.
8. A. J. Jacquet.
9. R. S. Burke.
10. J. W. Falls.
11. J. Feine.
12. W. Cournege.

24

And the jury being complete, the court appointed Alf. H. Isaacson foreman thereof, and the trial proceeded, and after hearing the pleadings, evidence, and argument, and receiving a charge from the court, the cause was submitted to the jury, who retired to their room to consider on their verdict.

After due deliberation they returned into court and delivered the following verdict, to wit:

We, the jury in this case, find for the plaintiff in the sum of nine hundred and thirty-six $\frac{28}{100}$ dollars, with legal interest from judicial demand and costs, being a return to him of the (2) two per cent. paid on the value of the stamps, viz, $468,144\frac{33}{100}$.

New Orleans, Dec'r 11, '77.

ALF. H. ISAACSON,
Foreman.

Whereupon it was ordered that the verdict be recorded.

Motion for new trial.—Entered and filed, December 13th, 1877.

U. S. circuit court.

WATSON VAN BENTHUYSEN
vs.
SIDNEY A. STOCKDALE. } No. 6870.

25

On motion of Geo. S. Lacey, U. S. attorney, and upon suggesting to the court that the verdict and judgment herein entered and rendered are contrary to law and the evidence, as shown by the reasons hereinafter set forth and made a part hereof, it is ordered that W. Van Benthuysen show cause on Thursday the 27th day of December, A. D. 1877, at 11 a. m., why a new trial should not be granted.

Reasons.

I.

If this be regarded as an action to recover back any portion of the tax for $468,144.33 which rested upon the tobacco while in bond, and when sold by plaintiff, such suit cannot be maintained, because—

1st. No testimony was introduced upon the trial of the cause impeaching directly or indirectly the validity or legality of that tax.

2d. No evidence was offered to show that an objection was made to

the payment of that tax, and no testimony introduced to prove an application had been made to the U. S. Commissioner of Internal Revenue or to any other U. S. official for relief against such payment.

26 3d. Plaintiff has neither averred nor proved a legal right in him individually to bring and prosecute this action for the reimbursement of any part or portion of the tax for $468,144.33.

II.

This action, as shown by plaintiff's petition, and more particularly by the statement thereunto annexed, which corresponds with the "assessment" offered in evidence by the U. S., has been instituted to recover back the tax of $2,512 assessed against Van Benthuysen as a dealer in tobacco; and the jury clearly erred in finding a verdict in favor of plaintiff.

The evidence showed that Van Benthuysen's sales of tobacco between the month of April, 1869, and the month of January, 1872, amounted in the gross to $1,256,000.00, $787,855.67 of which went to the principals of plaintiff, who were the owners of the tobacco, and $468,144.33 to the payment of a tax in favor of the U. S., which rested upon such tobacco in bond prior to and at the time of Van Benthuysen's sales; and as the tax against Van Benthuysen as a dealer in tobacco for the

27 aforesaid period of time, at the rate of $2 per thousand on $1,256,000.00 gross amount of sales, exactly equals the sum paid by him to Collector Stockdale, plaintiff was without either a legal or equitable right to a verdict in his favor.

The jury evidently considered that that portion of the gross sales of $1,256,000 which represented the tax of $468,144.33 ought not to be regarded as a part of plaintiff's sales of tobacco so far as to subject him to the payment of the tobacco dealer's tax upon the same, and therefore allowed a return of the tax of $2 for every thousand on the $468,144.33 which plaintiff had paid, or $936.28.

In so doing the jury clearly erred.

III.

If the amount allowed by the jury was not for a portion of the original tax of $468,144.33 paid through a sale of the tobacco, nor for a portion of the tobacco dealer's tax of $2.512 paid by him, then the verdict was not only unauthorized by the pleadings in this case, but it is unintelligible and sanctioned by no rule of law or equity which may be evoked in support thereof.

IV.

28 Verdict and judgment are contrary to law and the evidence.

Order new trial refused.—Extract from the minutes of January 12th, 1878.

W. VAN BENTHUYSEN
vs.
S. A. STOCKDALE. } No. 6870.

The rule for a new trial was called up—U. S. attorney for mover; Rouse & Grant for defendant in rule—and after hearing counsel, ordered that the rule be discharged and a new trial refused, with costs.

Judgment.—Extract from judgment book, November term, 1877.

NEW ORLEANS, *Tuesday, December 11th*, 1877.

Court met pursuant to adjournment. Present, Hon. Edward C. Billings, district judge.

W. VAN BENTHUYSEN
vs.
S. A. STOCKDALE. } No. 6870.

By reason of the verdict and in accordance therewith, it is ordered, adjudged, and decreed that Watson Van Benthuysen do have and
29 recover from Mrs. Laura Ellen Jones, widow of Sidney A. Stockdale, deceased, and testamentary executrix and natural tutrix of her minor children, who has heretofore been made party defendant herein, the sum of nine hundred and thirty-six $\frac{18}{100}$ dollars, being a return to him of two per cent. paid on the value of the stamps, viz, $468,144.33, with five per cent. interest thereon from 3d January, 1873, until paid, and costs of suit.

And considering that the said S. A. Stockdale was in his lifetime collector of internal revenue for the 1st collection district of the State of Louisiana, and that this action was brought against him in his official and representative capacity for money unlawfully exacted and collected from plaintiff, and by him paid into the Treasury of the United States in the performance of his official duty as such collector of internal revenue, it is ordered that no execution or other writ for the enforcement of this decree issue against the said defendant, Laura Ellen Jones, widow of Sidney A. Stockdale, but that the sum be paid out of
30 the proper appropriation from the Treasury of the United States, as provided by law in such cases.

Judgment rendered December 11, 1877.
Judgment signed January 14th, 1878.
(Signed) EDWARD C. BILLINGS, *Judge.*

Motion and order for writ of error.—Extract from minutes of March 28th, 1878.

W. VAN BENTHUYSEN
vs.
S. A. STOCKDALE ET AL. } No. 6870.

On motion of Geo. S. Lacey, U. S. attorney for the district of Louisiana, it is ordered that the defendant herein be and hereby is allowed a writ of error herein, in due form of law, returnable in the Supreme Court of the United States, in the city of Washington, D. C., on the first day of the next term thereof, without bond or security, as by the statute of the United States in such case made and provided.

31 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 30 pages contain and form a full, complete, true, and perfect

transcript of the record and proceedings had in the case of W. Van Benthuysen versus S. A. Stockdale, No. 6870 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court at the city of New Orleans, this 16th day of July, A. D. 1878.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 16th day of July, A. D. 1878.

EDWARD C. BILLINGS, *Judge.*

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Watson Van Benthuysen, plaintiff, and Laura Ellen Jones, widow and testamentary executrix of the last will and testament and natural tutrix of the minor heirs of the late Sidney A. Stockdale, defendant, a manifest error hath happened, to the great damage of the said defendant above named, Laura Ellen Jones, testamentary executrix, as by her complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 28th day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] F. A. WOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

(Indorsed:) United States circuit court. No. 6870. Laura Ellen Jones, ex'r, &c., plaintiff in error, versus Watson Van Benthuysen, defendant in error. Writ of error. Filed March 28, 1878. F. B. Vinot, d'y cl'k.

33 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to Watson Van Benthuysen, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Laura Ellen Jones, executrix of the last will and testament and natural tutrix of the minor heirs of the late Sidney A. Stockdale, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 29th day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

EDWARD C. BILLINGS, *Judge.*

34 (Indorsed:) United States circuit court. No. 6870. Laura Ellen Jones, executrix, &c., plaintiff in error, vs. Watson Van Benthuysen, defendant in error. Citation.

Marshal's return.

Received Mar. 29, 1878, by the U. S. marshal, and on the 1st day of April, 1878, served a true copy of the within citation in error on Watson Van Benthuysen, defendant in error herein, by handing the same to him in person in the city of New Orleans.

W. G. ELLIOTT,
D'y U. S. Marshal.

On this 2d day of April, 1878, personally appeared before me William G. Elliott, a deputy U. S. marshal for the district of Louisiana, and makes oath that he served a copy of the within citation on Watson Van Benthuysen as stated in his official return hereon.

W. G. ELLIOTT,
D'y U. S. Marshal.

Sworn to and subscribed before me this 2d day of April, 1878.

F. B. VINOT,
U. S. Comm'r.

(Indorsement on cover:) No. 254. Laura Ellen Jones, widow & ex'tr'x of Sidney A. Stockdale, late collector of internal revenue, plaintiff in error, vs. Watson Van Benthuysen. Louisiana C. C. U. S. Filed 11th October, 1878.

OFFICE SUPREME COURT U. S.
FILED
JAN 20 1881
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

LAURA E. JONES, EXECUTRIX,
-v.-
WATSON VAN BENTHUYSEN. } No. 254.

BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

LAURA E. JONES, EXECUTRIX,
v.
WATSON VAN BENTHUYSEN. } No. 254.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

At the trial of this cause, evidence was adduced tending to establish that the sales of tobacco upon which the tax had been collected, for the recovery of which this action was brought, were made while the tobacco was in bond, and was situated in the bonded warehouse; that said tax was assessed and collected upon the value of the tobacco and upon the amount of stamps which by law were required to be affixed upon the same before it was removed from the bonded warehouse; that the value of the tobacco so sold was $787,855.67, and the amount of the stamps placed upon said tobacco was

$468,144.33; and that the plaintiff was a commission merchant, charged his commissions as against his principals, both upon the value of the tobacco in bond and upon the amount invested in said stamps; that the special tax was assessed and collected upon both the value of the tobacco and the amount of the said stamps.

After the evidence and arguments were concluded, and before the jury had retired to deliberate upon their verdict, the counsel for the defendants requested the court to instruct the jury that—

"The legal basis upon which the United States internal revenue tax for sales against the plaintiff as a dealer in tobacco was to be calculated, was the gross amount of sales of the tobacco, viz, $1,256,000, and that if the jury found that the tax sought to be recovered in this suit was assessed and collected upon that basis, a verdict should be rendered for the defendant."

But the court refused to give this instruction, and instructed the jury that, by the act of Congress, the special tax of 2 per cent. upon the amount of sales of dealers in tobacco could not properly be assessed and collected upon the stamps which were required to be affixed upon tobacco in bond, and that, if the jury found as a fact that such a tax had been levied and collected from the plaintiff, not only upon the proceeds of tobacco sold in bond, but upon the amount of stamps required to be affixed upon such tobacco before it could be delivered from the bonded warehouse, to the extent of the tax upon the stamps which the plaintiff had paid to the defendant upon tobacco sold in bond he was entitled to a verdict. (Record, 8.) The defendant excepted. (*Ib.*)

ASSIGNMENT OF ERRORS.

The plaintiff in error assigns these errors:

1. The refusal to give the requested instruction in the language above quoted. (Record, 8; folio 22.)

2. The giving of the instruction specified in the last paragraph of the above printed statement of the case. (*Ib.*)

3. The rendition of judgment in favor of the plaintiff below. (*Ib.*, 10.)

BRIEF.

The taxes in controversy were assessed at various times between April, 1869, and January, 1872. (Record, 4, lower half.)

The assessment was made under that clause of section 59 of the act of July 20, 1868, chap. 186, which requires that "dealers in tobacco whose annual sales shall exceed $100 and do not exceed $1,000 shall each pay $5; and when their annual sales exceed $1,000 shall pay in addition $2 for each $1,000 in excess of $1,000. Every person whose business it is to sell or offer for sale manufactured tobacco, snuff, or cigars shall be regarded as a dealer in tobacco." (15 Stats., 152, top.)

Mr. Van Benthuysen says this was "his sole business." (Record, 3, folio 8.)

The seventy-first section of the act aforesaid punishes "any person who shall remove from any manufactory, or from any place where tobacco or snuff is made, any manufactured tobacco or snuff without the same being put up in proper packages, or without the proper stamp for the amount thereon being affixed and canceled, as required by law; or, if intended for export, without the proper warehouse stamp being affixed; or shall use, sell, or offer for sale, or have in possession, except in the manufactory, or in a bonded warehouse, any manufactured tobacco or snuff, without proper stamps being affixed and canceled; or shall sell, or offer for sale, for consumption in the United States, or use, or have in possession, except in the manufactory or in a bonded warehouse, any manufactured tobacco or snuff on which

only the warehouse stamp marking the same for export has been affixed." (15 Stats., 156.)

Comparison of this with other provisions and statutes shows that the foregoing phraseology means that no person, under pain of forfeiture, shall use, sell, or offer for sale unstamped manufactured tobacco; nor have unstamped manufactured tobacco in possession, except in the manufactory or in a bonded warehouse.

As already noticed, section 59 of the act of July 20, 1868, imposes the tax under discussion.

The clause of that section next following the one first above quoted relates to manufacturers of tobacco, and who shall be regarded as such, and concludes thus: "But no manufacturer of tobacco shall be required to pay the special tax as a dealer in tobacco for selling the products of his own manufacture." (15 Stats., 152.) By the amendatory act of June 8, 1872, chap. 315, § 31, he can only sell his own products "at the place of manufacture" without payment of the special tax. (17 Stats., 250.)

Section 60 of the act of July 20, 1868, chap. 186, is quoted hereafter. Section 61 prescribes the duties on tobacco, and section 62 the form of packages in which alone it may be offered for sale. (See *infra*.)

Section 67 required "suitable and special revenue stamps for the payment of the tax on tobacco and snuff" to be prepared under the supervision of the Commissioner of Internal Revenue, to be affixed and canceled in such manner as he might direct. "Also such warehouse stamps as are required by this act, which stamps shall be furnished to the collectors of internal revenue requiring the same, who shall each keep at all times a supply equal in amount to three months' sales thereof,

and shall sell the same ONLY to manufacturers of tobacco and snuff *in their respective districts* who have given bonds as required by law; to owners or consignees of [foreign, see § 77; 15 Stats., 158] tobacco or snuff upon the requisition of the proper custom-house officer having the custody of such tobacco or snuff; and to persons required by law to affix the same to tobacco or snuff on hand January 1, 1869." (15 Stats., 155, bottom.) Reference to section 78 of the same act shows who the persons last named were. (15 Stats., 159.)

Thus, it is seen, Mr. Van Benthuysen did not come within the category of those entitled to buy or affix stamps.

The allegation of his petition that the internal revenue tax was paid upon the tobacco sold by him "by the purchase, affixing, and cancellation of tax-paid stamps upon the packages containing said tobacco" (Record, 3, middle) is artful and ingenious rather than candid and ingenuous. It is saved from being absolutely false by the omission of any averment that the purchase, affixing, and cancellation were done by him.

The codification of the acts of July 20, 1868, and June 6, 1872, in Rev. Stats., secs. 3372, 3373, and 3374, shows my construction of the former act, forbidding the *possession* of unstamped tobacco to any one outside the manufactory or bonded warehouse, is correct.

Sections 73 and 74 of the act of July 20, 1868, chap. 186, read thus:

"SEC. 73. That the Commissioner of Internal Revenue, upon the execution of such bonds as he may prescribe, may designate and establish, at any port of entry in the United States, bonded warehouses for the storage of manufactured tobacco and snuff in bond, intended for exportation, selecting suitable buildings

for such purpose, to be recommended by the collector in charge of exports at such port, to be known as export bonded warehouses, and used exclusively for the storage of manufactured tobacco and snuff in bond.

"Every such warehouse shall be under the control of the collector of internal revenue in charge of exports at the port where such warehouse is located, and shall be in charge of an internal revenue storekeeper assigned thereto by the Commissioner of Internal Revenue.

"No manufactured tobacco or snuff shall be withdrawn or removed from any bonded warehouse without an order or permit from the collector in charge of exports at such port, *which shall be issued only for the immediate transfer to a vessel*, by which such tobacco or snuff is to be exported to a foreign country as hereinafter provided, *or after the tax has been paid thereon.*

"And such warehouse shall be under such further regulations as the Commissioner of Internal Revenue may prescribe. Any manufactured tobacco and snuff may be withdrawn once, and no more, from an export bonded warehouse for transportation to any other port of entry in the United States where an export bonded warehouse for the storage of manufactured tobacco and snuff may have been established, and such manufactured tobacco and snuff so withdrawn shall, on its arrival at the second port of entry, be immediately warehoused in an export bonded warehouse for the storage of manufactured tobacco and snuff, from which it shall be withdrawn only as provided by law.

"SEC. 74. That manufactured tobacco and snuff may be removed in bond from the manufactory, without payment of the tax, to be transported directly to an export bonded warehouse for the storage of manufactured tobacco or snuff established at a port of entry as hereinbefore provided; and the deposit in and withdrawal from any bonded warehouse, the transportation and exportation of manufactured tobacco and snuff, shall be made under such rules and regulations and after making such entries and executing such bonds and giving such

other additional security as may be prescribed by the Commissioner of Internal Revenue, which shall in all respects, so far as applicable, conform to the provisions of law and regulations relating to distilled spirits to be deposited in or withdrawn from bonded warehouse or transported or exported. All tobacco and snuff intended for export, before being removed from the manufactory, shall have affixed to each package an engraved stamp indicative of such intention, to be provided and furnished to the several collectors, as in the case of other stamps, and to be charged to them and accounted for in the same manner; and for the expense attending the providing and affixing such stamps twenty-five cents for each package so stamped shall be paid to the collector on making the entry for such transportation, but the provisions of this section shall not limit the time for tobacco or snuff to remain in bond." (15 Stats., 157, 158.)

If tobacco is sold in bond, the stamp not being upon it, the value of the stamp that would be required to be placed thereon before it can be removed for home consumption does not enter into the market price of the article nor swell the gross amount of sales, so no percentage is assessed thereon. It did become a part of the price of tobacco removed for sale in this country. And if to be so removed, the stamp had to be affixed by the manufacturer; for the law forbade stamps to be supplied to any other persons.

In his work upon taxation, Mr. Burroughs thus states the—

"*Conditions of removal for sale or consumption.*—From what has been said it will appear that before removal (*a*) the tobacco must be put up in legal packages; (*b*) the package must have printed thereon, or securely affixed, a label with the manufacturer's name, the registered number of the factory, and the district and State, and if a wooden package, the manufacturer's name and place of manufacture, or the proprietor's name and his trade-

mark, the registered number of the factory, the gross weight, the tax and net weight of each package must be printed or marked on the box. (*c*) Every package must have affixed and canceled a proper stamp or stamps to indicate the weight and class of the tobacco for which payment of the tax is made. (*d*) These stamps must be affixed and canceled in the mode prescribed by the Commissioner. Any removal of tobacco from the place of manufacture, without a compliance with these conditions, is a removal otherwise than as provided by law, and subjects it to forfeiture. How far the failure to comply with the regulations of the Commissioner can be made a cause of forfeiture, or of the imposition of a penalty, will be considered hereafter." (Burroughs on Taxation, pp. 645, 646.)

The same author also says that—

"Section 3372. As to removal [being reproduction of the act of July 20, 1868], includes something more than removal without paying the tax. The expression is a 'removal otherwise than as provided by law.' This includes all the requirements on the subject. It must be in legal packages, the label must be attached; if in a wooden package there must be printed or marked on it the manufacturer's name, the registered number of the factory, gross weight, net weight, and tare of the box, and the stamps must be affixed and canceled as required by law, indicating the weight and class of tobacco for which payment of the tax is made. A removal without complying with any one of the requirements of the statute subjects the property designated to forfeiture, while as to the sale the forfeiture is only incurred when it is made without affixing stamps, paying special tax, or giving bond." (Burroughs on Taxation, pp. 681, 682.)

The sum and substance of the government's claim is that, as this tobacco was sold or removed for sale, in this country—otherwise no internal-revenue tax would have "accrued" thereon (Record, 3, middle, and 8)—the

value of the stamp became as essentially incorporated into, and an inseparable part of the market-price of the article—as a vendible commodity—as did the sweetening; or, as the box, bucket, bag, or envelope in which it *had* to be sold; or as did the labor bestowed upon it. Without the labor it could not be sold as *manufactured* tobacco; without the prescribed form of covering it could not be so sold; without the stamp, it could not be withdrawn from the bonded warehouse and sold here. The other requirements, in fact, were all essential only that the performance of this last act might be secured. Not even the collector could sell the stamp except to the *manufacturer*, to be put upon the tobacco. So rigid was this requirement under the act of July 20, 1868, that a provision had to be inserted in the amendatory act of 1872, to authorize collectors to affix stamps to tobacco sold at a tax-sale, where he distrained unstamped tobacco as a means of collecting the tax, or to deliver them to some other *government officer* for that purpose. (17 Stats., 253, middle, amending section 67 (printed *ante*) of the act of July 20, 1868.)

Section 4 of this act declares that, as to distilled spirits, &c., "the tax shall attach to this substance as soon as it is in existence," &c.

As to manufactured tobacco, it attaches so soon as a purpose to sell in this country exists. Without the stamp there can be *no* legal sale here; that which is vital to a valid sale must become an integral part of that which *must* be sold with it, and to which it necessarily attaches by operation of law.

The act of July 20, 1868, chap. 186, sec. 60, enacts: "That in every case where it becomes necessary to ascer-

tain the amount of annual or monthly sales made by any person on whom a special tax is imposed by this act, or to ascertain the excess of such sales above a given amount, such amounts and excesses shall be ascertained and returned under such regulations and in such form as shall be prescribed by the Commissioner of Internal Revenue; and in any case where the amount of the tax has been increased by this act above the amount before paid by any person in that behalf, such person, except retail dealers, shall be again assessed, and pay the amount of such increase from the taking effect of this act; and in any case where the amount of sales or receipts has been understated or underestimated by any person, such person shall be again assessed for such deficiency, and shall be required to pay the same with any penalty or penalties that may by law have accrued or be chargeable thereon." (15 Stats., 152, bottom.)

The next two sections fix the rate of tax and the form of package to be used, viz:

"SEC. 61. *And be it further enacted*, That upon tobacco and snuff which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected the following taxes:" * * * (*Id.*, 153.)

"SEC. 62. *And be it further enacted*, That from and after the passage of this act all manufactured tobacco shall be put up and prepared by the manufacturer for sale, or removal for sale or consumption, in packages of the following description and in no other manner: * * * (*Id.*)

The fact that the regulations and action of the Commissioner required the dealers' returns to include in the gross amount of sales the value of the stamps attached to the package is an indication of the intention of the lawmakers, and of the true construction of the statute.

As a matter of fact, the defendant in error did not sell any *stamps;* he only sold *tobacco;* but that he could not sell until its value had been enhanced by affixing and *canceling* those stamps, without which it was not a vendible commodity in the markets of this country.

OFFICE SUPREME COURT U.S.
FILED
JAN 21 1881

Supreme Court of the United States,

OCTOBER TERM, 1880.

No. 254.

LAURA ELLEN JONES, widow, etc.,
Plaintiff in Error,

vs.

WATSON VAN BENTHUYSEN,
Defendant in Error.

Brief of J. D. Rouse and Wm. Grant, in behalf of Defendant in Error.

STATEMENT OF THE CASE.

The defendant in error, and plaintiff below, *as agent of the manufacturers,* was engaged in selling manufactured tobacco at New Orleans. The tobacco which he sold was shipped to New Orleans in bond, consigned to the Collector of Internal Revenue, and then placed in an export bonded warehouse, from which it could be removed only for exportation; or upon payment of the internal tax imposed thereon by the laws of the United States.*

* Act July 20, 1868, sec. 73, 15 stat., p. 157.

All his sales were in bond, the tax paid stamps being purchased and affixed *after* the sales were made. He was assessed a special tax as a dealer in tobacco, and also monthly a tax of two dollars per thousand upon the amount of his sales,* in which amount the assessor included the tax paid by stamps as aforesaid, thus assessing him both upon the amount of his sales of tobacco, and upon the tax paid thereon after the sale was made. The taxes so assessed were paid under protest; appeal was made to the Commissioner of Internal Revenue for the refunding thereof, which was refused; and this suit for recovery thereof, brought in due time.

The plaintiff below claimed, that the manufacturers had a right to sell their product themselves or through him as their agent, without incurring any liability to a tax upon their sales as dealers; and he also claimed that if any tax accrued upon such sales, it accrued only upon the amount of his sales of tobacco, and not upon the tax thereafter paid upon the same.

The case was tried by jury, and the Court being of opinion that the plaintiff was liable, as a dealer, to the tax upon his sales, although he was selling as agent of the manufacturers, the plaintiff did not press that point.

But the Court instructed the jury in substance that the plaintiff was entitled to recover the amount paid by him as a tax upon his sales, upon the value of the stamps affixed to tobacco sold in bond; and refused to instruct them, as prayed by defendant, to the contrary. (R., p. 8). The plaintiff had a judgment for the amount of the tax paid upon the value of the stamps.

We understand that the only errors alleged and complained of by the plaintiff in error, is the instruction given to the jury, and the refusal to charge as prayed, as above set forth.

---

* Act July 20, 1868, sec. 59, 15 stat. 152.

Argument.

The only question presented for decision here is whether the plaintiff below, who sold tobacco *in bond* only, and *thereafter* purchased and affixed the stamps denoting the payment of the tax thereon, was liable to a tax as dealer, upon the amount of his sales, including the specific tax upon the tobacco, or only upon the gross proceeds of his sales, excluding such specific tax.

For the sake of argument it may be conceded that after tobacco has been stamped, tax paid, and removed from bonded warehouse, and put upon the market, the stamp becomes a component part of its value; and that all *subsequent* sales thereof subjects the dealer who sells the same to the tax imposed by law upon such sales.

But in the case at bar, the sales were complete, before the specific tax became due and payable. The fact of the sale created no duty on the part either of the seller or of the buyer to purchase the tax paid stamps, and affix them to the tobacco. If the purchaser required the immediate delivery of the tobacco to him, for consumption, the tax must be paid before he could obtain it; and usually the seller, who is familiar with the routine, attends to the purchase and affixing of the stamps, for the convenience of his customer. And such was the case here. But the purchasers could as well have done it themselves, and if they had, would anyone contend that the seller thereby became liable to a tax upon the amount so paid by them?

The sale imposed no obligation to pay the specific tax upon the tobacco. The purchasers might have resold it in bond, or they, or their vendees, might have exported it, and relieved themselves from the payment of any tax upon it.*

---

* Act, July 20, 1868, sec. 73, 74, 15 Stat., 157.

It is plain from these considerations, that the assessment of a tax, as upon sales, upon the amount of specific tax paid by the plaintiff below, upon the tobacco sold by him in bond, was erroneous. Therefore the judgment in his favor should be affirmed.

Respectfully submitted,

J. D. ROUSE,
WM. GRANT,
Of Counsel for Defendant in error.